

RQ-1047



René O. Oliveira
Texas House of Representatives
District 37

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FEB 05 1998

Opinion Committee

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February 6, 1998

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Sarah Shirley
Chair, Opinion Committee
Attorney General's Office

Dear Ms. Shirley:

FILE # RQ-1047-DM
I.D. # 40056

As chairman of the House Committee on Economic Development, I respectfully request that you release the opinion, File ML-39960-97, ID 39966.

The opinion request was regarding the expenditure of sales tax revenues by corporations authorized under Section 4B of the Development Corporation Act of 1979, as amended. It was submitted by State Representative Juan Hinojosa and received by the Opinion Committee on December 6, 1997.

Please fax a copy of the opinion to my district office at (956) 542-1618. I would greatly appreciate your prompt response. Thank you.

Sincerely,

René O. Oliveira
State Representative
District 37
Chairman, House Committee on Economic Development



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GOVERNMENTAL INQUIRY
UNIT

Juan J. Hinojosa
STATE REPRESENTATIVE

FILE # ML-39960-97
I.D. # 39960

December 2, 1997

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Hon. Dan Morales
Attorney General
State of Texas
Austin, Texas

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Opinion Committee

Dear General Morales:

Mayor Leo Montalvo of the City of McAllen (Hidalgo County) and Mayor Cesar Gonzalez of the City of San Benito (Cameron County) have requested that we request an opinion from your office with respect to issues that have been raised regarding the expenditure of sales tax revenues by corporations authorized under Section 4B of the Development Corporation Act of 1979, as amended.

Issue One: Whether a development corporation created pursuant to Section 4B of the Development Corporation Act of 1979, as amended, (TEX. REV. CIV. STAT. ANN. art. 5190.6, § 4B) may spend sales tax revenues for "promotional" purposes?

Issue Two: Do grants of sales tax revenues to private organizations constitute prohibited "gifts" pursuant to article III, § 52 of the Texas Constitution?

Issue Three: May sales tax revenues be used for the following purposes: 1) to provide stipends or grants to students in job training programs, 2) to acquire teaching material such as books and instructional aids to be used for job training programs?

Background Facts

For several years, a development corporation has been providing "grants" to several private organizations in the community which are generally classified as "promotional grants." The organizations are given wide discretion on how the funds are spent. There are no enforceable contracts executed and the corporation has no policy limitations on the amount of money that it "grants" for "promotional" purposes. Generally, the organizations serve a beneficial function for the

local community. They sponsor a variety of youth, adult, crime prevention and business growth programs. For the most part, the grants are used for non-capital item purchases and are not used in connection with the operation and maintenance costs associated with public facilities which constitute "projects" under the Act.

Issue One

May a development corporation established pursuant to Section 4B (a "4B corporation") of the Act spend sales tax revenues for "promotional" purposes?

Analysis

The corporation has only such powers as are expressly granted by the Legislature *see Dillon's Rule*. Under the Act, the corporation may use sales tax revenues solely for the purpose of undertaking "projects." *Act*, at (g)(1); *See Op. Tex. Att'y Gen. No. LO 95-072 (1995)*. A project is *exclusively* defined as "land, buildings, equipment, facilities, and improvements..." which are 1) suitable for certain specified purposes under §(2)(A), or which "promote new or expanded business enterprises," or 2) projects which the board of directors of the corporation (in its wisdom and discretion) determines promote or develop new or expanded business enterprises.

The intention of the Legislature is to be found in the language of the statute. *Duval Corp. v. Sadler*, 407 S.W. 2d 493, 497 (Tex. 1966). The Act expressly authorizes undertaking or financing of "projects" and strictly limits the definition of that term. "Projects" are narrowly defined as expenditures for what would normally be characterized as capital assets (assets depreciable over time) or in layman's terms, as "brick and mortar". Search as we have, we simply find no further discretion. For example, while the board of directors does have discretion to determine what "projects" actually "promote new or expanded business enterprises," the project must, in the first instance, consist of land, buildings, equipment, facilities or improvements. Under this reading, therefore, a corporation could undertake the construction of any building (including the acquisition of equipment and facilities) and use the building for the purpose of promoting new or expanded business enterprises. *Compare Op. Tex. Att'y Gen. No. LO 95-072 (1995)*. And, as long as the board of directors exercised its discretion reasonably, it could also pay for the operation and maintenance of the building, if it were *publicly* owned. It seems that great discretion vests in the board once the initial hurdle is overcome. However, there is no express authority in the Act for the board of directors to undertake any promotional activities directly.

While there is no express prohibition against spending for promotional purposes by a section 4B corporation, there is such a prohibition imposed on a section 4A corporation which may spend no more than 10% of its revenues for "promotional" purposes. *Op. Tex. Att'y Gen. No. LO 94-037 (1994)*. Therefore, assuming, under the best of circumstances, that a §4B corporation could spend sales tax proceeds for promotional purposes, the 10 % limitation imposed by the Act would also apply to a section 4B corporation. A section 4B corporation "is subject to the limitations of a corporation created under other provisions of this Act..." unless a conflict exists. To reach such a conclusion, however, requires overcoming in the first instance, the narrow definition of a "project" which clearly implies only capital expenditures.

Assuming a corporation remained unfazed by the lack of clear authority to make an expenditure for "promotional purposes," what standard for review of its decision should it consider? The decision by the corporation's board of directors to spend sales tax proceeds directly or to enter contracts with private parties for the purpose of "promoting" business development could be challenged on the basis of abuse of discretion.

It appears to us that there is indeed some discretion which the corporation directors could exercise in an attempt to *indirectly* accomplish some level of direct "promotion". The Act allows the expenditure for a "project" that provides for "promotion of new or expanded business enterprises." Arguably, once we depart from the narrow meaning of "project" as brick and mortar and define a project as including "promotion," the board of directors' discretion becomes absolute. That is not our intent. However, if a public brick and mortar project is initially undertaken, then why would not promotional expenses related to the project be authorized as maintenance and operation expenses? Our view is that the corporation could undertake the acquisition or construction or all or a portion of a "facility" (a "brick and mortar" project) found by the board in whole, or in part, as useful for the "promotion of new or expanded business enterprises."

The direct/indirect distinction seems significant. For instance, may the corporation contract with the local Chamber of Commerce to generally provide the following worthwhile and needed services in a community: 1) to maintain a properly-staffed business services offices in the City to make services available during normal business hours and normal business days for a one-year period, 2) to organize a Christmas parade that features the City's business district, and 3) to operate a Winter Texan visitor's bureau for a five-month period between November 1 and March 31 of the year. If so, can the corporation's sales tax revenues be dedicated for those purposes? Our view is that the Act precludes those direct uses of sales tax revenues. Yet, the Act appears to grant discretion in the corporation to undertake a brick and mortar facility (by acquisition or construction: this could be by lease or purchase) intended to accomplish that type of promotion. Hence, it is not inconceivable that a local Chamber of Commerce could be contracted to undertake certain "operation and maintenance" functions of a public facility whose objective was in part the "promotion of new or expanded business enterprises." If so, the expenditure by the corporation would be for "maintenance and operation" of the project rather than for "promotional" purposes. Such activities seem to be authorized by the Act.

There remains a final hurdle against the argument that section 4B monies may be used for direct promotion. Section 4A(b)(1) of the Act which authorizes the collection of a sales tax for uses by a section 4B corporation specifically provides:

"[a] corporation created under this *section* may spend no more than 10% of the corporation's revenues' for promotional purposes and may contract with other existing private corporations to carry out industrial development programs..."

Therefore, similar to a section 4A corporation, a 10% limitation on revenue appears to exist for promotional purposes for section 4B corporations though not expressly stated in the Act.

Issue Two

Are grants of sales tax revenues by a corporation created under the Act to private organizations prohibited "gifts" pursuant to art. III, § 52 of the Texas Constitution?

Analysis

Article III, § 52(a) of the Texas Constitution provides:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever....

TEX. CONST. art. III, § 52(a).

Unlike similar cases which have been reviewed by the Attorney General, the corporations here receive "public money" as opposed to private money contributed to industrial development corporations. *Compare* Op. Tex. Att'y Gen. No. MW-85 (1979).

It is clearly a question of fact whether an expenditure by a municipality contravenes the constitutional prohibition. Key v. Commissioners Court of Marion County, 727 S.W.2d 667 (Tex. App.-Texarkana 1987, no writ). In all instances, the reviewing court must determine 1) whether the expenditure was for a "public purpose," and 2) whether an agreement existed which assured that the expenditure would be made in the public interest. Op. Tex. Att'y Gen. No. J.M.-1229 (1990). Great discretion is granted the governing body of the public entity making the expenditure. Davis v. City of Taylor, 67 S.W. 2d 1033, 1034 (Tex. 1934). Even if there is some private benefit as a result of the city's expenditure of funds, that does not affect the validity of the appropriation. Id. at 1035; See e.g., San Antonio Indep. Sch. Dist. v. Board of Trustees, 204 S.W.2d 22, 26 (Tex. App.-El Paso 1947, writ ref'd n.r.e.). The Constitution does not invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose. Brazoria County v. Perry, 537 S.W. 2d 89, 91 (Tex. Civil App. – Houston [1st Dist.] 1976, no writ).

In Commissioners Court of Marion County, the Texarkana Court of Appeals had before it a challenge against an expenditure by the County paid to a "private," non-profit corporation to sponsor a candlelight tour. The fact that the corporation was privately operated was not decisive. Rather, the court recognized the "public purpose" exception to article III, § 52 of the Texas Constitution. Reversing the summary judgment for the County, the Court identified the distinguishing features of the expenditure which might invalidate the expenditure: 1) the privately run organization had no contractual obligation vis-a-vis the County expenditure, and 2) the County retained no formal control over the expenditure. Therefore, while the County could have determined that the tour had a public purpose, other requirements for the exception to apply were missing. On the other hand, sufficient "consideration" might have existed had the non-profit foundation "obligated itself contractually to perform a function beneficial to the public..." Id. at 669.

It is our view that "grants" may not be made to any person (private or public). Every expenditure of monies by the corporation must be pursuant to some written contract that imposes a contractual obligation on the other party. That is to say that the corporation must be able to legally

enforce the obligation by the other party. But this is not a difficult task. A simple two or three page agreement executed by the parties that spells out the obligations of the parties should suffice in most cases.

Issue Three

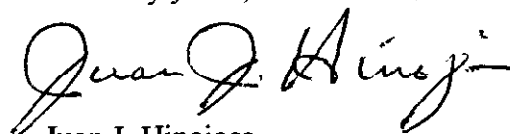
May a Corporation make expenditures of sales tax revenues in connection with a city-sponsored job training program or provide stipends for students enrolled in a job-training program?

Analysis

It is our view that generally a job training program would not qualify as the undertaking of a "project" as narrowly defined in the Act. Therefore, the corporation could not make a direct expenditure of sales tax revenues for stipends. Yet, under the Act, the corporation is authorized to make expenditures for the maintenance and operation of a public facility which has been acquired or constructed as a "project." It would appear then that a city could request that the corporation undertake the acquisition or construction and equipping of a public facility to be owned, maintained and operated by the City as long as the facility satisfies the other requirements of the Act. If so, the "maintenance and operation expenses" of the facility would be an authorized expenditure for the corporation. Likewise, if a piece of personal property qualifies as "equipment" then its acquisition should be authorized under the Act. Therefore, if the corporation finds that a public facility will "promote business opportunities," its maintenance and operation expenses are payable from sales tax revenues. It would appear that while the definition of operation and maintenance expenses may not be broad enough to include student stipends, it should cover some of the costs of personnel to operate and maintain the facility. This, it seems to us, could include the cost of instructional staff and equipment used in a teaching facility.

State Representative Rene Oliveria and I request that you submit your opinion to our office as soon as possible and please let us know if you need further information.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Juan J. Hinojosa". The signature is fluid and cursive, with a long horizontal stroke at the end.

Juan J. Hinojosa
State Representative District 40

cc: Mayor Leo Montalvo
City of McAllen
Mayor Cesar Gonzalez
City of San Benito
State Rep. Rene Oliveira
District 37